

REMARKS

This paper is submitted in reply to the Final Office Action dated July 31, 2006, within the three-month period for response. A Request for Continued Examination (RCE) is being filed concurrently herewith, along with authorization for a Credit Card charge in the amount of \$790.00 for the requisite fee per the Electronic Fee Sheet attached. Reconsideration and allowance of all pending claims are respectfully requested.

In the subject Office Action, claims 32 and 34 were rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. Claims 1-4, 6-9, 12-14, 16-21, 23-26 and 29-35 were rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent Application Publication No. 2005/0091391 to Burton et al. (Burton). Additionally, claims 5 and 22 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Burton, and claims 10-11, 15 and 27-28 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Burton in view of U.S. Patent No. 5,937,414 to Souder et al. (Souder). The new examiner maintained the above rejections, citing insufficient evidence in the previously submitted Affidavit to support a showing of diligence.

Applicants respectfully traverse the Examiner's rejections to the extent that they are maintained. Applicants have amended claims 32 and 34, and cancelled claims 33 and 35 per the suggestions of the Examiner and to address the § 101 rejections. Applicants respectfully submit that no new matter is being added by the above amendments, as the amendments are fully supported in the specification, drawings and claims as originally filed.

Now turning to the art-based rejections of the Office Action, Applicants note that all pending claims are rejected at least in part on the Burton reference, which has an earliest effective filing date of October 28, 2003. Applicants respectfully maintain, however, that the Burton reference is not prior art under 35 U.S.C. §102(e) (or any other section of 35 U.S.C. §102) because it was not filed in the United States before Applicants' date of invention. That is, Applicants' date of invention was prior to October 28, 2003. In support of Applicants' prior date of invention, Applicants had previously submitted Declarations of all five inventors in accordance with 37 C.F.R. § 1.131 and establish a

date of invention that is prior to the filing date of October 28, 2003 for the Burton reference.

While Applicants continue to assert the prior Declarations were sufficient to swear behind Burton, Applicants have nonetheless enclosed herewith a Supplemental Rule 1.131 Declaration from the undersigned, Douglas A. Scholer to address the Examiner's concerns with respect to the periods between the October 28, 2003 filing date of Burton and the date of constructive reduction of practice of the above-identified invention on January 15, 2004. Applicants respectfully submit that this additional Declaration, coupled with the prior-submitted Declarations, are sufficient to establish diligence on the part of Applicants during the entire time period at issue, and as such, Applicants have established a date of invention that is prior to the earliest effective filing date of Burton. Applicants therefore respectfully submit that Burton is not properly citeable against the instant Application, and all pending claims are now in condition for allowance.

In the Office Action, the Examiner raised alleged deficiencies in the prior Declarations with regard to an absence of specific dates evidencing diligence prior to October 28, 2003 and January 15, 2004. This period accounts for and coincides with the period from when the invention disclosure was received by the undersigned, October 20, 2003, until the application was actually filed. As attested to in the Supplemental Declaration from the undersigned, Douglas A. Scholer filed numerous other applications during this time period. As noted in MPEP 2138.06, "[i]f the attorney has a reasonable backlog of unrelated cases which he takes up in chronological order and carries out expeditiously, that is sufficient [to establish diligence]." MPEP 2138.06, p. 2100-119 (*citing Bey v. Kollonitsch*, 866 F.2d 1024, 231 USPQ 967 (Fed. Cir. 1986)). Applicants respectfully submit that a backlog of applications prepared and filed by the undersigned during that period represents regular and continuous progress toward constructive reduction of practice of the instant Application over the relevant time period.

Applicants respectfully submit that the enclosed and prior-submitted Declarations establish prior conception, diligence and reduction to practice on the part of the inventors prior to the effective filing date of the Burton reference. As such, the Burton reference does not qualify as prior art under 35 U.S.C. § 102(e). Given that all of the Examiner's

rejections depend at least in part on the Burton reference, Applicants respectfully submit that all of the Examiner's rejections should be withdrawn. Moreover, as the Examiner has cited no other references purporting to disclose or suggest the subject matter relied upon in the Burton reference in rejecting the claimed invention, Applicants submit that all claims are now in condition for allowance.

In addition, with respect to dependent claims 10-11, 15 and 27-28, which are rejected on the combination of Burton and Souder, Applicants additionally traverse the Examiner's rejections on the basis that, even if Burton were prior art against the instant Application, the combination of these references would still fail to render these claims obvious.

In summary, Applicants respectfully submit that all pending claims are novel and non-obvious over the prior art of record. Reconsideration and allowance of all pending claims are therefore respectfully requested. If the Examiner has any questions regarding the foregoing, or which might otherwise further this case onto allowance, the Examiner may contact the undersigned at (513) 241-2324. Moreover, if any other charges or credits are necessary to complete this communication, please apply them to Deposit Account 23-3000.

Respectfully submitted,

October 31, 2006
Date

/Douglas A. Scholer/
Douglas A. Scholer
Reg. No. 52,197
WOOD, HERRON & EVANS, L.L.P.
2700 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
Telephone: (513) 241-2324
Facsimile: (513) 241-6234